No. 77684-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT C. WOO, D.D.S.,

Plaintiff/Petitioner,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a California corporation; and NATIONAL SURETY CORPORATION, an Illinois corporation,

Defendants/Respondents,

and

DEPOSITORS INSURANCE COMPANY, an Iowa corporation; and THE PACIFIC UNDERWRITERS CORPORATION, a Washington corporation,

Defendants.

BRIEF OF AMICUS CURIAE WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a Washington not-for-profit corporation, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress in the civil justice system, including an interest in the rights of insureds under Washington law.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case involves a practical joke gone awry. While Dr. Robert Woo, D.D.S. (Woo) was performing a dental procedure under anesthesia on patient Tina Alberts (Alberts), also an employee of Woo's, he placed false teeth shaped like boar tusks into her mouth and took pictures. Later, when Alberts was shown the boar tusks and pictures she left Woo's employment as a surgical assistant. She then brought suit against Woo, principally for damages caused by this episode.

Woo's liability insurer, Fireman's Fund Insurance Company (Fireman's Fund), refused to defend Woo in Alberts' action, concluding that none of three separate coverages applied.[1] Woo settled with Alberts and sued Fireman's Fund for bad faith breach of its duty to defend, and for related violations of the Consumer Protection Act (CPA), Ch. 19.86 RCW.

[1] Fireman's Fund did not issue the insurance coverages in question, but, consistent with the agreement among the parties, is considered the sole insurer for purposes of this amicus curiae brief. See Fireman's Fund Ans. to Pet. for Rev. at 2 n.3.

On cross-motions for summary judgment, the superior court found Fireman's Fund had a duty to defend Woo under all three coverages. Subsequently, a jury determined Fireman's Fund had acted in bad faith and violated the CPA by mishandling the insurance claim, and awarded damages. The court imposed coverage by estoppel, along with attorney fees and costs. See "Judgment on Verdict" (CP 2731-38, hereafter "Judgment"). Fireman's Fund appealed to the Court of Appeals, Division I, which reversed, concluding that Fireman's Fund had no duty to defend Woo as a matter of law, and thus had not acted in bad faith or violated the CPA. This Court granted Woo's petition for review.[2] See Woo v. Fireman's Fund Ins. Co., 128 Wn.App. 95, 97-101, 114 P.3d 681 (2005), *review granted*, 157 Wn.2d 1035 (2006).

This amicus curiae brief principally addresses the law regarding a liability insurer's duty to defend. In order to put the argument that follows in context, a number of key facts are highlighted below. These facts are principally drawn from the Court of Appeals opinion, the briefing of the parties, and certain superior court records. See Woo, 128 Wn.App. at 97-101; Woo Supp. Br. at 1-20; Fireman's Fund Supp. Br. at 1-2; Woo Pet. for Rev. at 3-9; Fireman's' Fund Ans. To Pet. for Rev. at 1-5; Fireman's Fund Br. at 8-43; Woo Br. at 4-27; Fireman's Fund Reply Br. at 1-3; Alberts v. Woo "Complaint for Damages" (CP 29-39, hereafter "Complaint," reproduced in Fireman's Fund Ans. to Pet. for Rev. at

[2] WSTLA Foundation filed an amicus curiae memorandum supporting review in this case.

Appendix); "Order Granting Plaintiffs' Motion For Partial Summary Judgment, [Etc.]" (CP 753-58, hereafter "Order"); Judgment; "Court's Instructions To The Jury" (CP 3547-3569, hereafter "Court's Instructions"); "Special Verdict Form" (CP 3570-3572); Trial Ex. 40 (Fireman's Fund Policy, NSW 000001-NSW 000112).[3]

The Alberts Complaint.

The Complaint sets forth detailed factual recitations regarding the events leading up to and including the boar tusks episode, and Alberts' reaction once she became aware of the incident. See Complaint §II.[4] Most of the allegations are simple statements of fact, with an occasional description of Alberts' response to the particular alleged fact. The principal allegations regarding the boar tusks episode are set forth in ¶¶2.17-2.18:

> 2.17 While under anesthesia, Woo removed or had an assistant remove Ms. Alberts' oxygen mask. While the oxygen mask was removed, Woo placed or had an assistant place the boar tusks in Ms. Alberts' mouth. Following placement of the boar tusks in Ms. Alberts' mouth, Woo pried or had an assistant pry Ms. Alberts' eyelids open. Then, Woo took or had an assistant take at least four photos of Ms. Alberts. Some of these photographs show her eyes pried open, while others show her mouth being pried open by dental instruments. All four photographs show Ms. Alberts under anesthesia, with boar tusks protruding from her mouth.
>
> 2.18 Following this episode, Woo apparently continued with the scheduled procedure. Ms. Alberts woke from her anesthesia and was driven home by her husband, Allen. At this time neither Ms. Alberts, Allen Alberts, nor Jan Luedke were aware of the

[3] Trial Ex. 40 is substantively identical to the submissions before the superior court on summary judgment regarding the duty to defend. See Fireman's Fund Br. at 17-18, n.8.

[4] Alberts is joined by her husband Allen Alberts and mother Jane Luedke in the complaint. However, for purposes of this amicus curiae brief, she is treated as the sole plaintiff.

> awful experience Ms. Alberts had just endured. At no time prior to her surgery, did Woo inform Ms. Alberts that he was going to fashion boar tusks, place them into Ms. Alberts' mouth, pry her eyelids and mouth apart and photograph her in this demeaning state.

Complaint, at 3-4. Only one sentence of the 10-page Complaint contains an allegation that could be construed as describing Woo's motive for the boar tusks episode:

> 2.13 On May 5, 1999, Ms. Alberts was given a general anesthesia, her teeth were removed, and her flippers were placed into her mouth. *However, unbeknownst to Ms. Alberts, Woo had devised a scheme to humiliate and denigrate Ms. Alberts while she was anesthetized.*

Complaint at 3 (emphasis added).

The next part of the Complaint sets forth eight causes of action by Alberts against Woo, a number of which are for intentional tortious conduct, including assault and battery, with two claims alleging violation of state statutes regarding wages. Id. at 5-7. Later in the Complaint, Alberts alleges "Alternative Causes of Action" for medical negligence, lack of informed consent, and negligent infliction of emotional distress. Id. at 8-9. Each of these negligence-based claims of Alberts incorporates the previous allegations in ¶¶1.1 – 2.25. Id. For example, ¶ 18.1 provides:

> Ms. Alberts incorporates 1.1 through 2.25 as if fully set forth herein. Specifically, and in the alternative, she alleges that Woo acted in such a manner as to constitute negligent infliction of emotional distress causing her damages in an amount to be proved at trial.

Id. at 9.[5]

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[5] As discussed under the sub-heading ***"Fireman's Fund Refusal to Defend,"*** infra at 7-8, there were additional facts regarding these events that could have been readily discovered by the insurer before deciding not to defend.

The Fireman's Fund Coverage.

Woo's business insurance policy with Fireman's Fund consists of three separate coverages for "Dental Professional Liability" (professional liability coverage), "Employment Practices Liability" (employment practices coverage), and "General Liability" (general liability coverage). See Trial Ex. 40; Fireman's Fund Ans. to Pet. for Rev. at 6 & n.6. Each of these three coverages imposes upon Fireman's Fund a duty to defend Woo in any suit seeking damages subject to the particular coverage. See Trial Ex. 40 (NSW 000080; NSW 000031; NSW 000094).

The professional liability coverage indemnifies for damages "that result from rendering or failing to render dental services," and defines "dental services" as "all services which are performed in the practice of the dentistry profession as defined in the business and professional codes of the state where you are licensed." Woo, 128 Wn.App. at 99 (quoting from Clerk's Papers at 162). The practice of dentistry is defined in RCW 18.32.020. Id. (The full text of the current version of this statute is reproduced in the Appendix to this brief, for the convenience of the Court.) The duty to defend provision in the professional liability coverage provides in pertinent part:

> We will defend any claim brought against you or any other insured seeking damages that are covered under this section of this policy. We will do this even if the allegations of the claim are groundless, false or fraudulent.

Trial Ex. 40 (NSW 000080) (emphasis removed).

The general liability coverage indemnifies for "bodily injury ... caused by an occurrence" and "personal injury caused by an offense arising out of your business ... ." See Woo at 100 (quoting Clerk's Papers at 74). Definitions of relevant terms, including "Bodily Injury," "Personal Injury," "Occurrence," "Accident," and "Offense" are set forth in the Court of Appeals opinion. Id. at 100-01. The duty to defend provision states in pertinent part:

> We will have the right and duty to defend any suit actually seeking those damages. However, we will have no duty to defend any insured against any suit seeking damages for bodily injury, property damage, personal injury or advertising injury to which this insurance does not apply. Our right and duty to defend a suit does not begin until we are asked to defend the suit. As a condition precedent to our providing a defense against any suit or paying any damages awarded against an insured, that insured must agree to instruct their defense counsel to ask for a special verdict when we ask that insured to do so.

Trial Ex. 40 (NSW 000031) (emphasis removed).

The employment practices coverage indemnifies for "damages as a result of sexual harassment, discrimination, or wrongful discharge that arise out of a wrongful employment practice." See Woo at 99 (quoting Clerk's Papers at 154). The parties apparently agree that only the "wrongful discharge" component is at issue. See Fireman's Fund Ans. to Pet. for Rev. at 8. The policy defines "wrongful discharge" as:

> the unfair or unjust termination of an employment relationship which: breaches an implied agreement to continue employment; or inflicts emotional distress upon the employee, defames the employee, invades the employee's privacy, or is the result of fraud.

See Woo at 99-100 (quoting Clerks' Papers at 166). The policy defines "wrongful employment practice" as:

Any negligent act, error, omission or breach of duty committed in the course of: relations with employees; interviewing, hiring or refusing to hire anyone who applies for employment; or decisions to hire, promote, discipline or fire employees.

Id. at 100 (quoting Clerk's Papers at 166).

The duty to defend portion of this coverage provides:

We will defend any claim brought against you and any other insured seeking damages that are covered under this section of this policy. We will do this even if the allegations of the claim are groundless, false or fraudulent.

Trial Ex. 40 (NSW 000094).

Fireman's Fund Refusal to Defend.

Shortly after the incident described in the Complaint Woo notified Fireman's Fund, and the insurer assigned legal counsel regarding the potential claim. Counsel continued to represent Woo under this arrangement for several months after the Alberts litigation was commenced. However, ultimately Fireman's Fund denied the claim in its entirety and "pulled the defense," concluding that Woo did not have an insurable event under any of the coverages. See Woo Br. at 10. It elected not to provide a defense under a reservation of rights and seek declaratory relief regarding its duty to defend (or indemnify). Woo was left to make other arrangements to defend himself in the Alberts litigation. See Woo Pet. for Rev. at 6.

The briefing indicates that at the time Fireman's Fund determined not to defend it had not interviewed Woo regarding the boar tusks episode, and that, if it had, Woo would have stated that the episode involved an

employment-related "practical joke" that Woo thought would be funny. See Fireman's Fund Br. at 13-14. Woo also would have indicated to Fireman's Fund that he had assessed in advance whether Alberts could "take a joke" and decided that she would be able to do so. Id. at 14. Further, an interview of Woo would have revealed that after seeing the boar tusks photographs, Woo had misgivings about showing them to Alberts, but they were given to her before he resolved whether it was appropriate to do so. Id. at 15.

Conflicting Views of Underlying Events Regarding Duty to Defend.

There is a fundamental disagreement between the parties as to the character of Woo's conduct surrounding the boar tusks episode. Fireman's Fund portrays Woo's conduct as intentional in nature. See e.g. Fireman's Fund Supp. Br. at 14. On the other hand, Woo argues that, however "ill-conceived," the boar tusks practical joke on patient-employee Alberts was in furtherance of a "family atmosphere" in the dental office, and not intended to injure or harm Alberts. See e.g. Woo Br. at 4-5; Woo Pet. for Rev. at 3-4, 10; Woo Supp. Br. at 5. In light of the settlement of the underlying litigation, there was no fact-finding regarding Woo's state of mind and the true nature of the boar tusks episode, or what tort or torts Woo committed.

Trial Court Proceedings Regarding the Bad Faith/CPA Claim.

In Woo's action against Fireman's Fund for breach of the duty to defend and for bad faith and CPA claims, the superior court concluded on

partial summary judgment that Fireman's Fund breached its duty to defend under all three coverages. See Order at CP 755. (Apparently Woo did not seek summary judgment that such breach was bad faith as a matter of law.) The case proceeded to jury trial on whether the failure to defend was in bad faith and whether bad faith had otherwise occurred regarding the investigation and handling of the Alberts claim. The jury was also asked to determine CPA liability, related proximate cause questions, and damages. By special verdict the jury found for Woo on both the bad faith and CPA claims, without differentiating the basis for the finding of bad faith, and awarded damages. See Special Verdict Form.[6] Based on the verdict, the superior court imposed coverage by estoppel. See Judgment at 3 (CP 2733).

Court of Appeals Opinion Below.

Fireman's' Fund appealed to the Court of Appeals, Division I, which reversed, vacated the verdict and ordered the case dismissed. See Woo at 97. The court concluded:

> Because the complaint unambiguously alleged damages resulting only from intentional acts not required by or consisting of a legitimate part of the properly rendered dental procedure, the insurance company had no duty to defend the claim ... .

Id. In reaching this result, the court found each of the three different coverages under the policy did not apply. Id. at 103-08.

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[6] The pertinent instructions regarding the duty to defend and bad faith are Court's Instructions ##9-12. Under these instructions and verdict form it would appear the jury could have found bad faith based solely upon Fireman's Fund's failure to defend Woo under one or more of the coverages.

III. ISSUES PRESENTED

1.) Did the Court of Appeals improperly apply the test ("complaint allegation rule") for determining whether Fireman's Fund was required to defend Woo in the Alberts litigation against him?

2.) Is a liability insurer excused from its duty to defend a claim against its insured when it stems from a practical joke by the insured during the course of an otherwise covered event?

3.) May a liability insurer refuse to defend its insured based upon its view of an unresolved issue of law bearing upon coverage under the policy?

IV. SUMMARY OF ARGUMENT

A.) In determining whether Fireman's Fund breached its duty to defend Woo, the Court of Appeals misapplied the "complaint allegation rule," at least with respect to the professional liability coverage. While the court properly stated the rule, it failed to liberally construe the complaint in the underlying litigation, as supplemented by information readily available to the insurer, as encompassing negligence-based allegations.

B.) To the extent the Court of Appeals' determination that Fireman's Fund owed no duty to defend Woo under the professional liability coverage was based on its view that practical joking and horseplay cannot serve as a legitimate basis for coverage, it was in error. Absent an exclusion, a claim resulting from practical joking and horseplay, incident to an otherwise covered event, is consistent with the principle of fortuity governing insurance law, so long as no injury is intended by the insured.

C.) An insured should not be allowed to avoid the duty to defend based upon its view of an unresolved issue of law, merely because this issue is "fairly debatable." Consistent with the complaint allegation rule, at the time the insurer refuses to defend it must be *fairly debatable that the claim is clearly not covered* under the policy or applicable law. This analysis properly focuses the "fairly debatable" standard in the duty to defend context.

V. ARGUMENT

A. The Court of Appeals Misapplied The "Complaint Allegation Rule" For Determining A Liability Insurer's Duty To Defend.

1) Overview Of The Law Regarding The Duty To Defend And The Complaint Allegation Rule.

A duty to defend is customarily provided for under a liability insurance contract, such as the one involved in this case. It usually entails a commitment on the part of the insurer to defend regardless of the merits of the underlying claim. As in this case, the insurance contract frequently provides that a defense is owed even if the allegations of the claim are "groundless, false or fraudulent." See supra text at 5-7.

The right of an insured to a defense under a liability insurance policy is one of the "main benefits" of the policy. Safeco Co. of Am. v. Butler, 118 Wn.2d 383, 392, 823 P.2d 499 (1992). Entitlement to a defense may be of greater benefit to the insured than indemnity. Truck Ins. Exch. v. VanPort Homes, 147 Wn.2d 751, 765, 58 P.3d 276 (2002).

A defense provided by the insurer may mean the difference to the insured between financial well being and bankruptcy. Id.

The duty to defend generally arises at the time an action is brought against the insured, based upon the *potential for liability,* id. at 760, and thus is broader than the duty to indemnify. See Hayden v. Mut. of Enumclaw, 141 Wn.2d 55, 64, 1 P.3d 1167 (2000); Truck Ins. Exch. at 760. While the duty to indemnify turns upon whether the insured's liability is actually covered under the policy, the duty to defend only requires that the claim be "conceivably covered." Hayden at 64.

With the duty to defend, the focus of the analysis is on the allegations in the complaint in the underlying litigation. Holland Amer. Ins. v. National Indem., 75 Wn.2d 909, 911, 454 P.2d 420 (1969). The duty to defend "arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." Truck Ins. Exch. at 760 (citation omitted). Any ambiguities in the complaint must be resolved in favor of triggering the duty to defend. Id. If the insurer determines that coverage is unclear, but may exist, it has a duty to investigate the claim in order to give the insured the benefit of the doubt in determining whether it has an obligation to defend. Id. at 761.

The above approach to whether the duty to defend applies, hereafter referred to as the "complaint allegation rule," also serves to fulfill the liability insurer's quasi-fiduciary obligation to its insured under

the "equal consideration" rule. See Id. at 761 (citing Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 388, 715 P.2d 1133 (1986)).

An insurer may refuse to defend under the complaint allegation rule only if the underlying claim is clearly not covered by the policy. See Hayden at 64. For example, where an exclusion clearly and unambiguously applies to bar coverage, there is no duty to defend. See id.

If a liability insurer breaches its duty to defend, the consequences in Washington can be severe, with both contractual and extra-contractual remedies. See Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 561-65, 951 P.2d 1124 (1998) (citation omitted). Extra-contractual remedies for the tort of insurance bad faith include coverage by estoppel, and may involve liability beyond the policy limits. Id.; Truck Ins. Exch. at 761-66. CPA remedies are also available. Id. at 777. However, in Truck Ins. Exch. this Court provided a safe harbor for liability insurers disinclined to defend a particular claim due to doubts about their obligation to do so. In this circumstance, an insurer may defend under a "reservation of rights" and initiate a declaratory judgment action to determine whether the duty to defend (and pay) applies:

> If the insurer is unsure of its obligation to defend in a given instance, it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend. *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 93-94, 776 P.2d 123 (1989). A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel. "When that course of action is taken, the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay." *Kirk*, 134 Wn.2d at 563 n.3.

Truck Ins. Exch. at 761.[7]

The threshold question in this appeal appears to be whether the Court of Appeals properly applied the complaint allegation rule to this case in determining Fireman's Fund did not breach its duty to defend.

2) The Court Of Appeals Misapplied The Complaint Allegation Rule, At Least With Regard To The Professional Liability Coverage.

While the Court of Appeals below acknowledged that Alberts' complaint included negligence-based claims, it nonetheless concluded "the complaint unambiguously alleges only intentional conduct by Dr. Woo leading to Alberts' injuries ... ." Woo at 106. This portrayal appears to be based on nine words in the 10-page complaint – "devis[ing] a scheme to humiliate and denigrate Ms. Alberts." Id. (quoting from Complaint at §2.13, lns. 12-13).

This is a misapplication of the complaint allegation rule. Liberally construed, Alberts' complaint, read in light of readily available information that Dr. Woo considered this a practical joke which he believed Alberts would find funny, alleges liability for non-intentional tortious conduct, *e.g.,* negligent infliction of emotional distress. See supra

[7] Not every coverage issue can be resolved in such a declaratory judgment action. For example, fact disputes in the underlying litigation on which coverage may hinge cannot be decided in an insurer's declaratory judgment action. See Holland Amer. Ins., 75 Wn.2d at 912.

text at 3-4, 7-8.[8] The principal paragraphs setting forth the boar tusks episode do not ascribe to Woo an intention to do harm or injury to Alberts. Thus, under the alternative allegations the Complaint appears to state a claim within the professional liability coverage, assuming the claim otherwise results from the practice of dentistry.

However, the Court of Appeals also concluded the professional liability coverage does not apply because Woo's actions could not conceivably be considered a means or method "to diagnose, treat [etc.]" under the practice of dentistry statute, RCW 18.32.020. Woo at 103. It held:

> While Dr. Woo was clearly rendering dental services when he administered anesthesia, removed Alberts' teeth, and put in the proper flippers, we conclude as a matter of law that when he placed the boar tusks in her mouth and took pictures, he was not rendering professional services.

Id.

This analysis entirely recasts the inquiry. The question is whether damages sought under the coverage "result from rendering or failing to render dental services." Id. at 99. A liberal construction of the policy indicates that Alberts' damages resulted from rendering dental services. The practical joke happened in the course of treatment, and thus within the

[8] Whether Woo was entitled to believe such a joke could be perpetrated while Alberts was unconscious would have been a question of fact in the underlying litigation. It has been recognized that "consent may be assumed to the ordinary contacts of daily life, and a continued course of practical joking between the parties may permit the inference that there is leave to continue further." W. Page Keeton, *et al.*, Prosser & Keeton on Torts, Ch. 4 §18, at 114 (5th ed. Hornbook Series, 1984) (footnotes omitted).

remarkably broad definition of dentistry under RCW 18.32.020. See Appendix.[9] The complaint allegation rule should be satisfied.[10]

This alone does not fully answer the Court of Appeals' conclusion that Alberts' claim did not result from the practice of dentistry. Like Fireman's Fund, the court isolates the practical joke from the continuum of facts, in assessing whether it constitutes the practice of dentistry. Woo at 103-04. The flaw in this "freeze frame" approach is addressed in Section B.

B. In The Absence Of An Exclusion, Unless The Insured Intended An Injury From A Practical Joke Or Horseplay, The Principle Of Fortuity Is Met And The Insurer Must Defend.

There is an undercurrent of disbelief in the Court of Appeals opinion, and the briefing of Fireman's Fund, that a practical joke can serve as a legitimate basis for insurance coverage. See Woo at 103, 104, 106; Fireman's Fund Br. at 49. Insofar as the Court of Appeals is concerned, this undercurrent is no doubt influenced by its conclusion that the Alberts complaint alleged only intentional acts. See Woo at 106. On the other hand, Fireman's Fund appears to make this argument even assuming Woo

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[9] The "resulting from" requirement of the policy should be assessed in light of Alberts' unique dual status as patient and employee. The treatment itself stemmed from her employee status, and Woo's willingness to treat her. The practical joke is arguably tied to employee relations in the office. See Woo Br. at 32-33, 41; Woo Pet. for Rev. at 10; Fireman's Fund Br. at 50 n.34.

[10] The Court of Appeals' failure to recognize that Alberts' complaint arguably pleaded a non-intentional practical joke also appears to have tainted its analysis of the duty to defend under the general liability and employment practices coverages. As to the general liability coverage, it refused to acknowledge the "occurrence"/"accident" requirement was met, and that the claims arose out of Woo's business. See Woo at 106. As to the employment practices coverage, in casting Woo's conduct as unambiguously intentional it did not consider whether the Complaint contained a negligence-based "wrongful employment practices" allegation. See Woo at 105.

did not intend harm or injury to Alberts. See e.g. Fireman's Fund Br. at 15, 49; id. at 57 ("Dr. Woo's 'practical joke' was precisely the kind of 'horseplay' which courts have held does not fall within the scope of an insured's business. See Jackson v. Frisard, 685 So.2d 622, 628-31 (La. App. 1996)"). This analysis is undertaken notwithstanding that there is no practical joke or horseplay exclusion in Fireman's Fund's professional liability coverage, or for that matter any of its coverages. Absent this, or invocation of another exclusion such as an intentional acts exclusion, what then is the organizing principle?[11]

What appears to be at the heart of this undercurrent is an attempt to cast practical joking and horseplay as impliedly outside of insurance coverage as a matter of law, based on the "principle of fortuity." However, this principle is not offended when a practical joke or horseplay is not intended to cause harm or injury.

The principle of fortuity is viewed as an implied exception to insurance coverage. Robert E. Keeton & Alan I. Widiss, Insurance Law, §5.3, at 474-75 (1988). This concept:

> is widely viewed as a fundamental principle of insurance law ... that insurance contracts should not provide coverage when a loss is not fortuitous. Fortuity is generally, though not invariably, considered from the point of view of the person (usually the insured) whose interest is the basis of an insurance claim. A loss is not fortuitous, in this sense, if it is caused intentionally by that person.

Fortuity, or the lack thereof, is primarily a matter of intent. Therefore, it is important to bear in mind that in insurance law, as in tort law, questions about intent focus on the *consequences*, not the *acts*. Thus, the concept of

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[11] Apparently Fireman's Fund initially raised an "expected or intended" exclusion, but has not pursued this on appeal. See Woo Br. at 31 n.7.

> fortuity that is relevant to an application of an implied exception - - imposed by the courts as a matter of public policy when there is no express limitation set forth in the applicable insurance policy - - almost always involves an analysis of whether an individual intended the consequences which resulted in a claim for insurance coverage.

Id. at 475 (footnote omitted). Thus, fortuity is "essentially an interstitial rule of interpretation which is appropriately employed to limit coverage in certain types of circumstances when there is no provision in the applicable insurance policy that addresses the question." Id. at 476.

The Court of Appeals below appears to have mistakenly determined that Woo's practical joke may not serve as a basis for coverage because it violates the principle of fortuity. Woo at 103, 106. Even setting aside the misperception that Alberts' complaint alleged only intentional conduct, the Court of Appeals' view is incorrect. This Court has not assessed whether coverage based on practical joking or horseplay offends the principle of fortuity.[12] However, other courts have found that practical joking or horseplay may form the basis for a covered event. Although few cases discuss fortuity explicitly, they uphold coverage when the insured did not expect or intend the resulting injury or harm. See e.g. Jackson v. Lajuanie, 270 So.2d 859 (La. 1973) (holding prank shooting at service station covered under garage liability policy for all activities necessary or incidental to operations); Trafalski v. Allstate Ins. Co., 685 N.Y.S.2d 351 (N.Y.A.D. 1999) (holding liability insurer had duty to

[12] Cf. Tilly v. Dept. Labor & Ind., 52 Wn.2d 148, 324 P.2d 432 (1958) (upholding award of worker's compensation benefits resulting from horseplay incident occurring during course of employment).

defend based on issue of fact whether insured reasonably expected burn injuries from cigarette lighter/aerosol can prank); Castro v. Allstate Ins. Co., 724 So.2d 133 (La. App. 1998) (holding homeowner's insurer had duty to defend and indemnify when police officer injured another police officer while playfully ticking ear with radio antenna); Prosser v. Leuck, 539 N.W.2d 466 (Wis. App. 1995) (holding principle of fortuity did not preclude coverage under homeowner's policy for damage due to juvenile horseplay at warehouse, distinguishing sexual misconduct cases), *review denied*, 542 N.W.2d 156 (1995); compare State Auto Mut. Ins. Co. v. Scroggins, 529 So.2d 1194 (Fla. App. 1988) (holding no coverage for insured's intentional act of pulling a chair out from under victim, under exclusion for "bodily injury ... intended by the insured").

Jackson v. Lajuanie is particularly instructive, as the court there upheld coverage under a garage policy, in the absence of any exclusion, for an accidental shooting that was the result of a prank. The court rejected the insurer's argument that pranks and horseplay are not necessary or incidental to the operation of a garage, holding:

> It answers nothing to argue, as does USF&G, that "shooting a pistol at a customer is not a hazard that exists in connection with premises operations."
>
> * * *
>
> It is admitted that the shooting was accidental. It is irrelevant that shooting customers is not normally anticipated in service station operations. ... The broad language of the garage liability policy's insuring clause covers this accident.

270 So.2d at 862,863.[13] Based on the foregoing, to the extent the Court of Appeals opinion below represents a rejection of the duty to defend based upon lack of fortuity, this analysis cannot stand.

Additionally, the average purchaser would contemplate that non-intentional practical joking and horseplay will occur, and that an insurance policy would not discount them out of hand. People do dumb things, including in the work place. If an insurer is not inclined to provide a defense or indemnification for such all too human conduct, it should fashion an express exclusion to this effect. Otherwise, to restrict liability coverage based upon an *implied* condition that limits a defense or coverage to activities strictly necessary or incidental to the insured's business exposes the insured to fortuitous losses that the average purchaser would reasonably believe are covered.

The Court of Appeals below appears to have based its analysis that Woo's practical joke was not a necessary part of the practice of dentistry upon extension of the Court of Appeals decisions in Standard Fire Ins. Co. v. Blakeslee, 54 Wn.App. 1, 771 P.2d 1172 (1989), and Wash. Ins. Guar. Ass'n v. Hicks, 49 Wn.App. 623, 744 P.2d 625 (1987), to this non-sexual misconduct context. See Woo, 128 Wn.App. at 104.[14] This raises yet

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[13] The Woo Court of Appeals reliance on Jackson v. Frisard, 685 So.2d 622 (La. App. 1996), is misplaced. See Woo at 107-08. This case *upheld* coverage under an exception to a business pursuit exclusion for activities ordinarily incident to non-business pursuits, yet is used by the court to support its conclusion that, with respect to general liability coverage, practical joking cannot constitute a business activity. Id. at 107; see also Woo Br. at 41-42.

[14] Blakeslee and Hicks are of questionable relevance here. These cases hold that sexual misconduct, which is deemed to be intentional, is generally not covered even where it occurs in the course of insured business activity. See Blakeslee, 54 Wn.App. at 4-5, 8-

another question: may a liability insurer assert an *unresolved issue of law* to defeat a duty to defend, where it chose not to defend under a reservation of rights while seeking declaratory relief. See Woo Pet. for Rev. at 19-20. This question is addressed in Section C.[15]

C. Consistent With The Complaint Allegation Rule, The "Fairly Debatable" Standard In The Duty To Defend Context Should Focus On Whether, In The Face Of An Unresolved Issue Of Law, The Claim Is *Clearly Not Covered.*

The Court of Appeals accepted Fireman's Fund's argument that the limitation on coverage and duty to defend in Blakeslee and Hicks, supra, applied to defeat any duty to defend. See Woo at 103-04; Fireman's Fund Br. at 25-27, 49-52. While the parties debate whether this precedent should control, Woo properly asks whether Fireman's Fund is even entitled to make this argument, given the uncertainty of the law on this point *at the time it was required to decide whether to provide Woo a defense.* See Woo Pet. for Rev. at 19-20. This should be the dispositive issue before the Court.

10; Hicks, 49 Wn.App. at 627-28. The Court of Appeals below expands the rationale of these cases insofar as its analysis suggests that even non-intentional practical joking or horseplay during an otherwise insured event is not covered unless it independently serves a purpose of the insured event, e.g. "to diagnose, treat, [etc.]." Woo at 103 (quoting RCW 18.32.020). Additionally the causation-based analysis of Blakeslee and Hicks regarding professional liability coverage should not be applied in this case to excuse Fireman's Fund from a duty to defend. Here, the unique status of Alberts as patient *and* employee provides the necessary link for concluding the damages covered by the practical joke resulted from the practice of dentistry. If the Court reaches this issue, which it need not under the analysis in Section C., infra, it should reject the extension of Blakeslee and Hicks to this context.

[15] An implicit lack of fortuity analysis by the Court of Appeals may also have influenced its resolution of the duty to defend under the other two coverages. For example, under the general liability coverage it concluded the practical joke cannot be an offense arising out of Woo's business. See Woo at 107. Similarly, under the employment practices coverage the court did not recognize the practical joke as arguably constituting a "wrongful employment practice." See id. at 105.

This question surrounds the lens through which an insurer is required to assess its duty to defend with regard to *legal* issues. Fireman's Fund suggests that it is enough that the legal issue regarding the application of Blakeslee-Hicks was "fairly debatable" at the time of its decision. See Fireman's Fund Br. at 24-26 & n.12, 49-53. There is support for this notion based upon a statement in Kirk, supra, that:

> [b]ad faith will not be found where a denial of coverage *or a failure to provide a defense* is based upon a reasonable interpretation of the insurance policy. *Transcontinental Ins. Co. v. Wash. Pub. Utils. Dists.' Utility Sys.*, 111 Wn.2d 452, 470, 760 P.2d 337 (1988).

134 Wn.2d at 560 (emphasis added).

This statement should not be read as fully resolving the law with regard to the duty to defend, for several reasons. First, Kirk was a federal certification, and a bad faith breach based upon a failure to defend was presumed. Id. at 562. Second, the case cited in Kirk for the stated rule, Transcontinental Ins. Co., supra, only involved the fairly debatable standard with respect to the duty to indemnify. See 111 Wn.2d at 454-55, 470-71.[16]

More importantly, taken at face value the statement in Kirk does not square with the unique obligations placed upon a liability insurer in the duty to defend context, represented primarily by the complaint allegation

[16] Kirk was recently cited with approval in resolving a claim for bad faith failure to defend in Holly Mtn. Res. v. Westport, Ins., 130 Wn.App. 635, 650, 104 P.3d 725 (2005). This case did not involve unresolved issues of law regarding the scope of coverage provisions. Id. It is also noteworthy that the fairly debatable principle referenced in Kirk was clarified in Mulcahy v. Farmers Ins. Co., 152 Wn.2d 92, 106-07, 95 P.3d 313 (2004), which warned that an arguable interpretation of existing law does not exonerate an insurer as a matter of law, as this only follows if it otherwise acted in good faith.

rule. See §A 1.), supra. Under this rule an insurer cannot refuse to defend unless the claim is "clearly not covered" under the policy. Kirk at 561. This rule should also dictate how insurers view legal issues in the duty to defend context. In the same way a complaint gives rise to a duty to defend if "conceivably covered," Hayden at 64, if an insurer believes a pivotal coverage issue is only fairly debatable, not that the claim is clearly not covered, then it should be required to defend. Otherwise the duty to defend is undermined, as debatable issues abound in the realm of insurance. Thus, the lens in the duty to defend context must be more searching, and the fairly debatable standard should be re-focused here. An insurer should only be able to avoid liability for bad faith in refusing to defend if, at the time it denied a defense, *it was fairly debatable that the claim was clearly not covered* under the policy and/or governing law.[17]

This proposed clarification of the fairly debatable standard described in Kirk is consistent with this Court's more recent opinion in Truck Ins. Exch., which provides that an insurer uncertain about the duty to defend can avoid potential bad faith liability by defending under a reservation of rights and seeking declaratory relief. See 147 Wn.2d at 761; text supra at §A 1.). Recently, the Court of Appeals in Allstate Ins. Co. v. Bowen, 121 Wn.App. 879, 885, 91 P.3d 897 (2004), read Truck Ins.

[17] In this case, it does not appear that this heightened fairly debatable standard was met by Fireman's Fund, given its assessment of the Blakeslee-Hicks theory. See Fireman's Fund Br. at 24-26 & n.12. While Fireman's Fund may have thought the legal issue was fairly debatable, its briefing does not suggest it was convinced coverage clearly did not apply on this basis. If the proposed fairly debatable standard governs, then the issue of whether the Blakeslee-Hicks holding applies would not be reached, because its application would not excuse Fireman's Fund's failure to defend.

Exch. as imposing a duty to defend where Washington law regarding coverage issues is unclear. Insurance law commentator Allan D. Windt reads Bowen as reflecting a minority view, that coverage questions involving legal issues of policy interpretation do not abide the determination of coverage for indemnification purposes. See Allan D. Windt, Insurance Claims & Disputes, §4:2, at 282-84 & n.32 (4th Ed. 2001), & 2006 Supp. at 54 n.32.

Under the majority rule as described by Windt, an insurer may refuse to defend based upon an unresolved question of law affecting coverage. See Windt, §4:2 at 282-83 & n.31, & 2006 Supp. at 53-54 & n.31. Under this view, as described by Windt, there is no parallel principle to the way facts must be assessed under the complaint allegation rule. Id. In contrast, under the minority view, the complaint allegation rule in effect extends to unresolved legal issues bearing on coverage. Windt, §4:2 at 282-84 & n.32 & 2006 Supp. at 54, n.32; see generally Lucker Mfg. v. Home Ins. Co., 23 F.3d 808, 813-14 & n.5 (3rd Cir. 1994) (discussing majority and minority views).

The minority view urged here does not leave Washington insurers without options. As previously indicated, an insurer may provide a defense under a reservation of rights and seek to be relieved of the duty to defend by declaratory judgment action, Truck Ins. Exch. at 761, thus avoiding a claim of failure to defend and bad faith. However, if an insurer determines not to defend a claim and is ultimately wrong about the claim

not being covered, it is liable for breach of contract in failing to defend. It may also be liable for bad faith (or under the CPA) if at the time its decision was made it was not fairly debatable that the underlying claim was *clearly not covered.*

This analysis harmonizes the lens through which insurers must view unresolved *legal* questions at the time a determination regarding the duty to defend is made with the lens used for assessing unresolved factual issues. It provides insurers with a means for assessing the obligation to defend, while safeguarding the right of insureds to this significant insurance contract benefit.

VI. CONCLUSION

This Court should adopt the reasoning advanced in this brief in resolving this case.

DATED this 14th day of August, 2006.

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On Behalf of WSTLA Foundation

*Brief transmitted for filing by e-mail; signed original retained by counsel.

APPENDIX

West's RCWA 18.32.020

West's Revised Code of Washington Annotated Currentness
Title 18. Businesses and Professions (Refs & Annos)
Chapter 18.32. Dentistry (Refs & Annos)

➡18.32.020. Practice of dentistry defined

A person practices dentistry, within the meaning of this chapter, who (1) represents himself as being able to diagnose, treat, remove stains and concretions from teeth, operate or prescribe for any disease, pain, injury, deficiency, deformity, or physical condition of the human teeth, alveolar process, gums, or jaw, or (2) offers or undertakes by any means or methods to diagnose, treat, remove stains or concretions from teeth, operate or prescribe for any disease, pain, injury, deficiency, deformity, or physical condition of the same, or take impressions of the teeth or jaw, or (3) owns, maintains or operates an office for the practice of dentistry, or (4) engages in any of the practices included in the curricula of recognized and approved dental schools or colleges, or (5) professes to the public by any method to furnish, supply, construct, reproduce, or repair any prosthetic denture, bridge, appliance, or other structure to be worn in the human mouth.

The fact that a person uses any dental degree, or designation, or any card, device, directory, poster, sign, or other media whereby he represents himself to be a dentist, shall be prima facie evidence that such person is engaged in the practice of dentistry.

X-ray diagnosis as to the method of dental practice in which the diagnosis and examination is made of the normal and abnormal structures, parts or functions of the human teeth, the alveolar process, maxilla, mandible or soft tissues adjacent thereto, is hereby declared to be the practice of dentistry. Any person other than a regularly licensed physician or surgeon who makes any diagnosis or interpretation or explanation, or attempts to diagnose or to make any interpretation or explanation of the registered shadow or shadows of any part of the human teeth, alveolar process, maxilla, mandible or soft tissues adjacent thereto by the use of x-ray is declared to be engaged in the practice of dentistry, medicine or surgery.

The practice of dentistry includes the performance of any dental or oral and maxillofacial surgery. "Oral and maxillofacial surgery" means the specialty of dentistry that includes the diagnosis and surgical and adjunctive treatment of diseases, injuries, and defects of the hard and soft tissues of the oral and maxillofacial region.

CREDIT(S)

[1996 c 259 § 1; 1957 c 98 § 1; 1957 c 52 § 20. Prior: (i) 1935 c 112 § 6; RRS § 10031-6. (ii) 1943 c 240 § 1; Rem. Supp. 1943 § 10031-6a.]